IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

APPEAL NO.663 OF 2001

Satish Ambanna Bansode]
Age about 32 years, Occ:]
Agriculture, resident of]
Miraj, Tal. Miraj, Dist.]
Sangli,]
(Presently lodged at]
Kolhapur Central Prison,]
Kolhapur-416007)]..Appellant

Vs.

The State of Maharashtra]
Through P.S.O.]
Miraj City Police Station]
Sangli]..Respondent

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Mr.Arfan A.E.A.Sait Advocate (appointed as amicus curiae) for Appellant
Smt.V.R.Bhosale A.P.P. for the State

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CORAM: N.V.DABHOLKAR AND SMT.V.K.TAHILRAMANI,JJ.

DATE : FEBRUARY 2,2006

ORAL JUDGMENT (PER: N.V.DABHOLKAR,J):

1. By this appeal under Section 374(2) of Code of Criminal procedure, present appellant/original accused challenges the finding of guilt, conviction and sentence imposed upon him by Additional

Sessions Judge, Sangli vide his judgment and order dated 13.7.2001, delivered at the conclusion of Sessions Case No.33 of 2000. By the impugned judgment, he is held guilty of murder of his wife viz. Satyavva and sentenced to suffer life imprisonment and pay a fine of Rs.100/- in default R.I. for fifteen days.

2. Prosecution story which unfurls from the dying declaration which is the only direct evidence pertaining to alleged incident, can be stated as follows:

. Deceased Satyavva aged 28 years at the time of alleged incident, was married to the accused about 15 years ago and it can be said that it was a child marriage. At the time of incident, the couple was gifted with two daughters viz. Renuka and Chandrawwa, but the daughters were staying in Indira Nagar locality of Sangli, where the parents of deceased Satyavva were residing. Satyavva and accused were cohabiting at Visapure Galli Miraj.

3. The incident took place at the night of 4th and 5th October, 1999, to be precise at about 2.30 a.m.

on 5th October, 1999. According to Satyavva, accused-husband was drunk, he abruptly woke up at about 2.30 a.m. and started beating her. She got scared. Husband picked up kerosene tin from the house, poured it on her person and ignited her by using a match-stick. She also adds that as the saree caught fire, she started shouting. At this juncture, husband tried to remove saree from her person and in that process, he suffered burn injuries to his both hands. Neighbours also gathered and couple was taken to civil hospital Sangli in a rickshaw.

. Subhash Koli Police Head Constable (P.W.3) attached to Vishrambaug Police Station, was posted on duty at civil hospital. After admission of Satyavva at about 4.00 a.m., intimation was sent by the hospital to the police station and therefore, he was instructed by the police station to record the statement of burn patient. He accordingly recorded statement of Satyavva, only after obtaining opinion from Dr. M.G.Madhu Kumar between 6.30 a.m. to 7.00 a.m. on 5.10.1999. Satyavva succumbed to burn injuries at about 10 a.m. It appears that dying declaration was treated as an

F.I.R. by Miraj police station and Crime No.194 of 1999 was registered. The investigation was carried out in parts by P.S.I. Shri.Ramesh Bhokare (P.W.6) and A.P.I. Shri.Baliram Waghchavre (P.W.7). It is needless to say that the trial ended in conviction by the judgment which is under challenge.

4. Apart from P.W.3 Subhash Koli Police Head Constable, Dr.Madhu Kumar (P.W.4) Medical Officer was present when the patient was admitted and also when the dying declaration was recorded. P.W.1 Shabbir Gulab Mulla who is neighbour of the accused and victim, and P.W.2 Mohd.Hanif Dastgir who is the landlord of the accused, provide some details about the incident. P.W.5 Dr.Nandkumar Banage was the medical officer attached to civil hospital Sangli at the material time. He had performed autopsy and by post-mortem Notes (Exh.17) he has recorded his opinion regarding cause of death due to "Septicemic shock due to 95% of superficial to deep burns".

5. Heard advocate Mr.Sait for the appellant and Smt.V.R.Bhosale, A.P.P. for the Respondent-State. Mr.Sait has taken us through the entire evidence as also the portions of the judgment which he tried to

submit, was incorrect approach of the trial Court.

. On reference to impugned judgment, it appears that the trial Court accepted the evidence of neighbours Shabbir Gulab and landlord Mohd. Hanif to arrive at a conclusion that the spouses were the only occupants of the house on that night. In fact, learned trial Judge has gone to the extent of saying that death of Satyavva was tantamount to custodial death. He has also accepted the evidence of these two neighbours for arriving at a conclusion that the spouses had some quarrel/hot exchange at about 10.30 p.m. before going to bed and that these two gentlemen had reached location after hearing the shouts of the victim.

. For the reasons discussed in paragraphs 8 to 10 of the judgment, the learned Judge found the evidence of Head Constable Koli supported by the evidence of Dr.Madhu Kumar, to be reliable and on finding the dying declaration to be reliable, the trial Court has recorded a finding of guilty and passed the impugned conviction and sentence.

6. Advocate Mr.Sait has urged that admittedly the

victim was a woman with mother tongue Kannada and yet her dying declaration is in Marathi, which itself is a doubtful circumstance. He has also referred to concluding paragraph of dying declaration which is sum up of the earlier narration in the police format. According to him, taking into consideration the time gaps it is difficult to believe that deponent might be in a condition fit to make a statement. In order to pursuade us to believe that there is a possibility of victim not being fit to make a statement, he has also placed reliance upon admissions of autopsy surgeon and neighbours. He took exception because dying declaration is recorded by police personnel and there does not appear to be any attempt on the record that services of the S.E.M. were tried to be secured.

. The learned A.P.P. supported the judgment of the trial Court by adopting the same line of reasons as recorded by the trial Court.

7. No doubt, Head Constable Koli (P.W.3) in his cross-examination was suggested that mother tongue of the deponent was Kannada. He has pleaded

ignorance about the same. He denied suggestion that when he recorded statement, deponent was not able to talk Marathi clearly. Even taking the suggestion on its face value, it is not the suggestion of defence that deponent did not know Marathi at all or she could not speak Marathi. The suggestion of the defence itself indicates that 'Kannada' being the mother tongue, Satyavva was able to speak Marathi only with difficulty. Satyavva was married about 15 years ago and it would not be improper to draw an inference that since then she must be residing at Miraj with her husband. In the absence of any other possibility on record, a person who resides in the locality where mother tongue of majority of people is Marathi, it cannot be accepted that Satyavva must not be knowing Marathi at all. We are not inclined to look to the Marathi dying declaration with suspicion merely because mother tongue of deponent was not Marathi.

8. So far as contention that the patient must not have been in a position to make a statement, P.W.1 Shabbir Gulab has admitted; "that time, she was crying in agony, that time, she was not in a

position to talk". There is no dispute that Satyavva had suffered extensive burn injuries, the percentage recorded by Dr.Madhu Kumar is 98 and that by autopsy surgeon Dr.Nandkumar Banage to be 95. Dr.Nandkumar Banage during his cross-examination deposed;

> "It is true to say that due to 98% burns, the patient had pain and agony. Due to pains and agony, there can be mental pressure on the patient. But in case of burns, the patient can be semiconscious. He may speak in that condition, but he cannot apply his mind fully. His speech and words may be irrelevant".

. The learned advocate Mr.Sait has placed reliance upon these admissions of the neighbour as also the Medical Officer in addition to the time-table of the events. The incident in question took place at about 2.30 a.m. Victim was admitted to civil hospital at about 4.30 a.m. The dying declaration is recorded at 6.30 a.m. and victim expired at about 10.00 a.m. The learned advocate desired that as a cumulative effect of all above things, the possibility peeps out that victim may not be in a position to make a statement when the purported dying declaration was recorded.

. No doubt, Dr.Nandkumar Banage has made admissions as reproduced hereinabove. But those admissions are a sort of opinion by a person in the medical field. All the admissions are in term "may" and not in term "must". By admissions of Dr.Nandkumar Banage, it cannot be presumed that because Satyavva had suffered 95 to 98% burns, she must not have been in a condition fit to make a statement. The defence has not succeeded in obtaining any admission to this effect from Dr.Madhu Kumar who was present when the patient was admitted, who was treating the patient and who had certified fitness of patient to make a statement when the dying declaration was recorded by Head Constable Koli. Dr.Madhu Kumar was certainly a person on better footing to opine about the mental state of the victim than the autopsy surgeon. So far as admission by neighbour P.W.1 Shabbir, he describes the condition of the patient soon after the incident. Inability to speak can also be result of mental shock that the victim must have suffered (not a shock because of burn injuries). Although advocate Mr.Sait referred to admission of Dr.Madhu Kumar that Satyavva was under treatment when her dying declaration was recorded and that

i/v fluid was administered to her, this admission is inadequate to arrive at a conclusion, desired by advocate Mr.Sait. Defence has not been able to bring admission on record through Dr.Madhu Kumar that victim was administered sedative much before recording of dying declaration. Such details are also not brought on record by challenging the Medical Officer to produce the case papers. Inspite of reliance on all available pieces of evidence on record by Mr.Sait, we are unable to accept his submission that there is strong possibility of patient not being in a condition fit to make a statement when the same was recorded, more so, in the light of deposition of Dr.Madhu Kumar under whose care the patient was kept at civil hospital.

9. Advocate Mr.Sait also requested us to give serious consideration to subsequent conduct of the accused as reflected in the depositions of prosecution witnesses. P.W.1 Shabbir Gulab has admitted in his cross-examination that accused also had suffered burn injuries to his hands and chest, he was also crying in pain and was asking to shift him to the hospital. According to landlord Mohd.

Hanif (P.W.2), accused was asking that Satyavva should be removed to hospital immediately. In order to urge that subsequent conduct of the accused is compatible to his innocence, advocate Mr.Sait also placed reliance on some portion of the dying declaration. The victim has narrated that after her saree caught fire, she was frightened and she was shouting. At that juncture, husband tried to remove her saree. According to advocate Mr.Sait, there is every reason to believe that accused tried to extinguish the fire. He was eager that wife should be shifted to hospital and such conduct suggests only the innocence of the accused.

. The argument appears to be attractive at first blush. In dying declaration, Satyavva first narrated that the husband was drunk. Neighbour and landlord having confirmed that the spouses had verbal exchange type quarrel before going to bed, it is the claim of Satyavva that abruptly at about 2.30 a.m. husband woke up and started beating her and ultimately ignited her by pouring kerosene upon her person. The finding of the trial Court that spouses were the only occupants of the house, is fully justified. The dying declaration makes it

clear that although the couple has two daughters, both daughters are residing with their grand-mother at Sangli. As such, although, we are doubtful whether the saree was being pulled with intention to extinguish the fire and save the victim or whether that was an attempt to hold the victim inside the house and prevent her from going out, accepting the possibility as suggested by defence for the sake of arguments, the same will have to be termed as belated change of mind.

10. During his statement under Section 313 of Code of Criminal Procedure, the accused although denied any quarrel before going to bed, he admitted that the two went to bed, without adding presence of any third family member in the house. He has pleaded that a false charge-sheet is filed against him. He claims that he had quarrel with P.W.1 Shabbir and hence, he has given false evidence against the accused. He has pleaded the theory of accident. According to him, as the house is not having electricity supply, a small lantern was kept on the wall when the couple went to bed. Probably the lantern fell down as a result of movement of either cat or rat and the wife caught fire by such fall of

lantern. She started shouting and that is how he woke up. He wrapped the blanket around his hand, wife was shouting that she should be taken to hospital. In the meanwhile, neighbours gathered and the couple was taken to the hospital. According to him, his in laws have tutored Satyavva to implicate him. To our surprise the claim that he tried to extinguish fire by removing saree of the victim, is conspicuously absent in elaborate reply to concluding question series.

. The trial Court Judge was justified in holding that the extent of injuries rules out the possibility of accidental burns by a fall of small lantern called ‘chimney’. On reference to panchnama of the spot which was shown to police by P.W.1 Shabbir, there is nothing to indicate that there was fall of the lantern and thus support the story of accident. In fact, a bucket full of water and aluminium container were very much there near the small corner sink. It may not be risky to infer that there was no attempt on the part of the accused to extinguish the fire, when the water containers in the house were still full of water. The trial Court was justified in ruling out the

defence philosophy.

11. No doubt, this is a case wherein we do not have any dying declaration recorded by Special Executive Magistrate or Judicial Magistrate and Mr.Sait tried to rely upon this circumstance and also pleaded that the dying declaration recorded by police officer, therefore, may not be believed. We are unable to agree with this submission of learned counsel Mr.Sait, firstly because, the police officer who recorded dying declaration was not invited to explain as to why the services of Special Executive Magistrate or Judicial Magistrate were not invited for recording the dying declaration, secondly, the admission of the patient in the hospital was at about 4.10 a.m. Head Constable Koli was posted at the out-post attached to the civil hospital. He has recorded the dying declaration as per directions from his police station upon intimation from civil hospital to police station regarding the admission of burn patient. The time span available also appears to be such that Head Constable Koli was justified in not spending time to secure the presence of Special Executive Magistrate or Judicial Magistrate. We

are, therefore, not inclined to draw adverse inference against the dying declaration because the same is recorded by police officer and there is nothing on record to indicate an attempt on the part of police machinery to secure the presence of Special Executive Magistrate or Judicial Magistrate for that purpose.

12. Mr.Sait has placed reliance upon the judgment of this High Court reported at **2005 Cri.L.J.4167; Mohan Sadhu Kawale Vs. State of Maharashtra,** and more particularly, on the observations of this Court in paragraphs 15 and 16 of the judgment pertaining to the appreciation of dying declaration. The incident in the reported matter had taken place on 12.2.1990 between 8.00 to 8.30 p.m. The statement of victim Lalubai was recorded by police patil Eknath at the location itself upon which he had obtained signatures of eight villagers. A dying declaration was recorded on 13.2.1990 at about 3.00 a.m. by Special Executive Magistrate after Lalubai was admitted in the hospital. This was after obtaining an endorsement from the Medical Officer to the effect that deceased was conscious. The post-mortem Notes

showed that Lalubai had suffered 100% burns. The accused pleaded theory of suicide on the part of Lalubai. According to him, Lalubai had mortgaged her land to him five years prior to incident. She was not being maintained by her husband and she had also developed illicit relationship with the accused. Accused was maintaining the deceased and her son. Deceased was desirous of getting married with the accused, the said proposal was objected by people of her community since accused and deceased belonged to different community and police patil had an evil eye on Lalubai. In paragraphs 15 and 16 of the reported judgment, the Court has recorded its reasons as to why the Court was not inclined to place reliance on the dying declaration recorded on 13.2.1990 at 3.00 a.m. Deceased was accompanied to the hospital by police patil and P.W.8 Balabai. Balabai had admitted that she disliked illicit relationship between the accused and deceased. Balabai and police patil were on inimical terms with the accused. The case papers showed that among various injections administered to the deceased, one was injection of fortwin and Medical Officer had admitted that fortwin was sedative drug which is used as a pain killer. As a cumulative

effect of these reasons, the Court found it unsafe to place reliance upon the dying declaration. We feel that the observations relied upon by advocate Mr.Sait are the observations in the facts and circumstances of that case and cannot be used as a *ratio decidendi.*

. In the matter at hands, although patient had suffered 100% burn injuries, the Head Constable and Medical Officer are not the persons having any animus against the appellant. The landlord and neighbours have provided the evidence regarding presence of the accused at the time of incident and they have also provided motive for the alleged incident by deposing about the quarrel between the accused and deceased soon before going to bed. We are not inclined to take a view similar to that taken by earlier Division Bench in the reported matter relied upon by advocate Mr.Sait.

13. For the reasons discussed hereinabove, the appeal fails and the same is dismissed.

. Registrar (Judicial) shall ensure supply of certified copy of this judgment, free of costs, to

the appellant through prison authorities.

. Professional charges of Advocate Mr.Arfan A.E.A.Sait who conducted the appeal for the prisoner as amicus curiae, are quantified at Rs.2,500/-.

[N.V.DABHOLKAR, J.]

[SMT.V.K.TAHILRAMANI,J.]